



STATE REPRESENTATIVE  
**JOSEPH PARISI**

WISCONSIN STATE ASSEMBLY

48th DISTRICT

TO: SENATE COMMITTEE ON JUDICIARY, CORRECTIONS, INSURANCE, CAMPAIGN  
FINANCE REFORM, AND HOUSING  
FROM: REPRESENTATIVE JOE PARISI  
RE: SUPPORT FOR SB 235 AND AB 333- "THE WHISTLEBLOWER PROTECTION ACT"  
DATE: OCTOBER 29, 2009

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Chairwoman Taylor, thank you for holding a hearing on this important legislation.

SB 235/AB 333 protect a journalist's right to keep sources and material gathered during the news gathering process confidential. The bill provides absolute privilege for information about the identity of a confidential source or any information received from a confidential source during the news gathering process. In addition, this bill provides qualified privilege for the identity of or information received from a non-confidential source.

Several people will testify today who will be able to answer specific questions regarding the legal details of this legislation. My testimony will focus on why protecting confidential media sources is essential to any functioning and well-informed democracy.

Freedom of the press is a cornerstone of our democracy, and our nation's founders understood that an informed citizenry is essential to keeping the government accountable to its people and in promoting honest and ethical conduct in our society.

Journalists play an essential role in informing our society. They not only report news and information to the public, but also serve as watchdogs, investigating and exposing what are often illegal, unethical or dangerous activities by both government and private actors. But to do that job effectively, journalists sometimes must rely on sources who do not want their identities revealed for fear of personal safety, retaliation by employers, or other serious repercussions.

Many whistleblowers are unlikely to come forward without a guarantee of confidentiality. Failing to protect whistleblowers is bad for both the individual whistleblower and the general public. Just imagine how many unsafe consumer products or acts of government corruption we would not know about if not for the bravery of individual whistleblowers and the offer of confidentiality they were promised by a reporter. Good government and public safety suffers when people do not feel safe sharing sensitive information with the media.

Thirty-seven states have taken proactive steps that protect reporters from compelled disclosure of confidential sources in state court proceedings. This overwhelming acknowledgment by other states of the importance of protecting confidential sources highlights Wisconsin's lack of such statutory protections.



STATE REPRESENTATIVE  
**JOSEPH PARISI**

WISCONSIN STATE ASSEMBLY

48th DISTRICT

Reporters across the country, including Wisconsin, have been subpoenaed or questioned in court proceedings regarding confidential sources. Some reporters have even been jailed for refusing to break their promise of confidentiality to sources. This attack on the relationship between reporters and confidential sources has a chilling effect on the reporting of public and private malfeasance.

The most recent high-profile Wisconsin case occurred in 1995, when *Milwaukee Magazine* printed an investigative report on a Milwaukee dentist who was accused of bilking patients by pushing them to get unneeded and expensive treatments. A reporter for the magazine had interviewed several other dentists and dental experts, some of whom spoke on condition of anonymity. The accused dentist's attorneys filed suit in circuit court and demanded the names, notes and other material from the magazine's interviews.

The circuit court told the magazine to turn these over. But the appeals court declared that journalists have greater protection than other witnesses from having to comply with discovery subpoenas. SB 235/AB 333 expands on and clarifies the appellate court ruling and offers judges guidance in interpreting the threshold for requiring reporters to reveal information from both confidential and non-confidential sources.

The Whistleblower Protection Act honors our country's longstanding commitment to freedom of the press. Protecting the watchdog function of the press is a necessity for any open and informed society that wishes to hold its public and private institutions accountable. I am happy to join Sen. Kreitlow in authoring this bill. Please join us in supporting this legislation.

**BILL MEMO**  
**WHISTLEBLOWER PROTECTION ACT**  
**BILL SPONSOR: REP. PARISI AND SENATOR KREITLOW**

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*Bill Purpose*

The purpose of this legislation is to protect a journalist's right to keep sources and news information gathered during the reporting process confidential. Such protections are absolutely necessary when a reporter exercises her First Amendment right to gather information and contact confidential sources regarding corruption, corporate malfeasance, or other violations of the public trust. Without such protections, whistleblowers would be far less likely to divulge this important information out of fear of retaliation.

This bill was drafted in consultation with the Wisconsin Newspaper Association, the Wisconsin Broadcasters Association, and the Wisconsin Freedom of Information Council.

*Current Law*

Existing case law offers judges some guidance on evidentiary rules regarding confidential sources. However, the parameters need further clarification. There have been cases under current Wisconsin law where journalists have been required by trial courts to reveal confidential sources to litigants in an ongoing court case. While Wisconsin appellate courts have provided some protection to journalists, these decisions need to be codified and clarified to provide certainty in this area of the law.

*Bill Summary*

This bill would provide absolute confidentiality for the identity of a confidential source or any news that a reporter gathers from a confidential source. It provides qualified confidentiality for other news that a reporter gathers. A court could compel a journalist to disclose the identity of a non-confidential source or news that is gathered from a non-confidential source if all of the following apply:

1. The news, information, or identity is highly material and relevant.
2. The news, information, or identity is critical or necessary to the maintenance of a party's claim, defense, or proof of a material issue.
3. The news, information, or identity is not obtainable from any alternative source.
4. There is an overriding public interest in the disclosure of the news, information or identity.

*Precedents in Other States*

At least 32 other states have passed similar legislation.

# The Capital Times Company

THE CAPITAL TIMES DAILY EVENING NEWSPAPER

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October 29, 2009

Senator Lena C. Taylor, Chair  
Senate Committee on Judiciary, Corrections, Insurance,  
Campaign Finance Reform and Housing  
415 South, State Capitol  
PO Box 7882  
Madison WI 53707-7882

Dear Senator Taylor and Members of the Committee:

My name is Dave Zweifel, editor emeritus of The Capital Times here in Madison, and I support passage of a whistle blower protection law for Wisconsin.

I've been in the news business as a reporter and editor in this town for 47 years now and as a result have had several experiences with news sources who for very good reasons did not want to be identified. Some were terrified that they'd lose their job. Others felt there would be recriminations against their families.

If a news organization cannot guarantee that their names won't be identified, many simply would not pass on the information even when its revelation could result in righting a serious wrong.

I personally became interested in the so-called shield law back in my investigative reporting days in the 1960s. A reporter for a Kentucky newspaper had done a prize-winning story about the hashish trade in the state, revealing how it was operating under the noses of local law enforcement.

Authorities wanted him to hand over his notes and the names of the people he had talked to. The newspaper pointed out that the people had been told their names wouldn't be revealed. If it had not done so, there wouldn't have been a story and the people of Kentucky would not have learned about it.

But, the state's Supreme Court ruled that the reporter either had to reveal the names or go to jail for contempt. The news was a big jolt to investigative journalists around the country and spurred states to begin enacting shield laws. At last count, 36 states and the District of Columbia have enacted such legislation in the years since.

Wisconsin didn't enact such a law. That was primarily because our state Supreme Court, in a case that came before it about the same time as the one in Kentucky, declared that under Wisconsin's constitution, news people do have a right to keep sources confidential – unless there is simply no other way for authorities to learn of culprits should a crime have been committed.

So, in effect, we've had a so-called shield law under common law and lower courts and courts of appeals have affirmed that constitutional right through the past 39 years.

But, as we all know, the law can be fragile these days. Only a few years ago, a circuit court in Milwaukee ruled that Milwaukee Magazine had to turn over the identity of dentists who had given a reporter information about a fellow dentist who had been fraudulently billing patients. Fortunately, an appeals court overturned that decision.

The bill before you today would codify that common law.

Most requests for confidentiality come from people who know first-hand of a waste or corruption and want to do something about it. They'll call a reporter or editor and in effect say, "I've got a story for you, but you've got to keep my name out of it." In effect, this law is more about protecting them than about reporters and editors.

It has been my experience that while a confidential whistle-blower alerts the news organization to a possible story, subsequent investigation and reporting most often turns up sources who are willing to go on record. In fact, that's

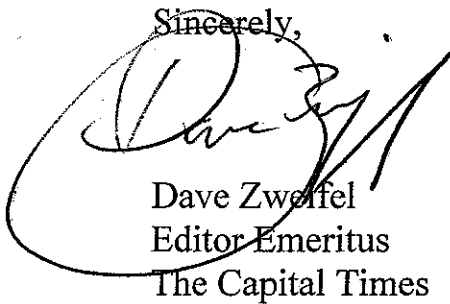
the way we prefer it. Most newsrooms don't like to use confidential sources unless there simply is no other way to get an important story.

In most newsrooms, including ours, reporters who turn in stories with confidential sources must reveal the source to their editor. The reporter is often asked to go back and try again to get others on the record. Getting people to identify themselves adds credibility to the story.

But, unfortunately, that can't always be the case. And if those who know about wrongs but are worried they can't trust a news person to keep his or her name confidential, we would never be alerted to the wrong in the first place. In short, it's the public that loses.

That's why the time has come for Wisconsin to enact this very sensible legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Zweifel", is written over a circular stamp. The signature is fluid and cursive.

Dave Zweifel  
Editor Emeritus  
The Capital Times



# Wisconsin Freedom of Information Council

DEVOTED TO PROTECTING WISCONSIN'S TRADITION OF OPEN GOVERNMENT

Senate Committee on Judiciary, Corrections,  
Insurance, Campaign Finance Reform and Housing  
Sen. Lena Taylor  
Room 415 South State Capitol  
Madison, WI 53708

Oct. 29, 2009

Dear Sen. Taylor and Committee Members,

I write in support of SB 235, which provides statutory protections against the forced disclosure of information gathered by news organizations. The goal is to protect the public interest in obtaining information that sources will provide only if promised confidentiality.

Media organizations do not offer confidentiality to sources routinely or cavalierly. They usually do so only when the sources have a well-founded fear of consequences, such as the loss of their livelihood.

This bill would strengthen the protection for sources, and facilitate the freer flow of information. The same standards of accuracy and fairness would still apply to journalists, and tips that don't check out would not be published or aired.

*Isthmus*, the paper I work for, received a confidential tip that UW student Brittany Zimmermann had called 911 before her murder in April 2008. Our reporter confirmed this through official sources, some of whom also requested confidentiality. Our story led to a major review of the county's emergency dispatch system.

"My reliance on confidential sources came only after public officials thwarted attempts to obtain the information via the public records law," says the reporter, Jason Shepard, who is completing his doctoral dissertation on the issue of shield protections. He adds that the dearth of news stories that pivot on these protections "suggests that the Wisconsin news media do a pretty good job at policing the use of confidential sources."

SB 235 is good public policy, which is why similar protections for journalists are on the books in 37 other states. None of these states, including the more than dozen whose protections are as strong as the one proposed here, has ever been prompted to rescind or amend its laws.

The Wisconsin Freedom of Information Council – whose membership includes the Wisconsin Newspapers Association, the Wisconsin Broadcasters Association, and the Wisconsin Associated Press – strongly supports passage.

Best,

Bill Lueders  
President

## Anonymous whistleblowers deserve protection

Oct. 29, 2009

Senator Lena C. Taylor, Chair  
Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing  
415 South, State Capitol  
PO Box 7882  
Madison, WI 53707-7882

Dear Senator Taylor and Members of the Committee:

Thank you for the opportunity today to share my thoughts on Senate Bill 235 authored by Senator Pat Kreitlow, and Assembly Bill 333 authored by Representative Joe Parisi. I also want to provide you with the context of why anonymous whistle blowers deserve protection based on my knowledge and experience gained from almost 30 years as a journalist.

I speak today as executive editor of *The Post-Crescent*, a daily newspaper serving the Fox Valley from Appleton. Long-standing *Post-Crescent* policies concerning anonymous sources are similar to policies in newsrooms across Wisconsin and certainly in other Gannett Wisconsin newsrooms in central and eastern Wisconsin.

As president of the Wisconsin Associated Press Association, I know that the subject is one that newspaper editors and publishers don't take lightly. On behalf of Gannett Wisconsin newspapers and Wisconsin AP editors, thank your engaging in this historic discussion. Your approval of these companion bills will greatly enhance public policy in Wisconsin and the free flow of information.

The case for passage of this legislation is direct: Whistleblowers can be the best friend of a public that opposes government corruption. They know what's going on in government — and they know what's going on isn't right. But they may be acting at their own risk. They could lose their jobs. They could face other retribution. They should be protected.

AB-333 and SB-235 provides those individuals that protection no matter whether they are in the public or private sectors when they decide — usually at great risk to themselves — to expose fraud, waste or abuse through a news reporter. The primary goal of this legislation is to give those “whistle blowers” protection against retaliation for the wrongs they expose by permitting qualified news reporters to withhold their identification. Reporters are involved to the extent that they are the “conduit” through which wrong-doing comes to public attention.

There are limited protections in Wisconsin now, because of court rulings that have addressed the issue. But those protections need to be strengthened and put into law.

Many newspapers, including *The Post-Crescent*, use anonymous sources rarely. In the case of *The Post-Crescent*, anonymous sources are used only when the information obtained is of vital public interest and there's simply no other way to get it.



It is a standard policy in newsrooms that anonymous sources should be avoided whenever possible. News has more credibility and accountability when sources are identified. A great proportion of stories we publish originate as news tips from the public — or, in some cases, from people in the know such as state legislators. For example, we often hear: "Here's a tip but keep my name out of it." Fair enough. We then track down the information and look for corroboration that can be on the record. Or, if a tip turns out to be truly bogus, that tipster loses his or her own credibility.

But in some very few cases, we are approached by someone who stands to lose their job or their source of income. Someone who is putting their family at risk. Someone who is compelled to reveal a wrongdoing that affects the greater public good. In that case, a reporter doesn't have the authority at my newspaper — or any other newspaper that I'm aware of — to unilaterally grant the confidentiality we are talking about today. The reporter must confer with the immediate supervising editor, then make the case to why there is no other alternative.

I, in turn, inform my publisher and in some cases, we will consult with attorneys. Only after we thoroughly examine such an issue would we grant such a confidentiality. For us to do anything less would put our newspaper at great legal and financial risk.

So, you see this is not an arbitrary, snap-judgment decision about routine information. Rather, it is about information important to the public that otherwise wouldn't see the light of day. Thus, it is important that the news media has the ability to keep anonymous sources anonymous.

Thirty-eight states already have similar legislation working in the public interest, and we're nearing enactment of federal legislation, too. Wisconsin can join the ranks of states that stand strongly against public corruption. The Legislature should recognize this bill's value to responsible, trustworthy government and pass it into law.

I would be pleased to answer any questions you may have. Thank you.

A handwritten signature in black ink, appearing to read "Dan L. Flannery", with a stylized flourish at the end.

Dan L. Flannery  
Executive Editor  
The Post-Crescent  
Appleton, Wisc.



PETER D. FOX  
WNA Executive Director  
Peter.Fox@WNAnews.com

# WISCONSIN NEWSPAPER ASSOCIATION

...world's oldest press association, established 1853

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October 29, 2009

Senator Lena C. Taylor, Chair  
Senate Committee on Judiciary, Corrections, Insurance,  
Campaign Finance Reform and Housing  
415 South, State Capitol  
PO Box 7882  
Madison, WI 53707-7882

Dear Senator Taylor and Members of the Committee:

On behalf of the 240 daily and weekly newspaper members of the Wisconsin Newspaper Association, thank you for this opportunity to testify in support of Assembly Bill 333 and Senate Bill 235. Our association strongly supports this proposal. It is accurately and appropriately called the "Whistle Blower Protection Act."

The problem this legislation seeks to address is very real. Wisconsin is one of only a handful of states without this particular legislation in place to preserve the free flow of information. Thirty-eight states plus the District of Columbia already have enacted such laws. The "Whistle Blower Protection Act" before you today is based on a principle of law that Wisconsin courts already have recognized – that in order to protect the free flow of information to the public, reporters must have a privilege from having to reveal their confidential sources. See *Kurzynski v. Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995).

By providing an important tool to journalists in their essential role of informing the people of Wisconsin, this proposal ultimately is centered on benefitting the public good. At the same time, AB-333 and SB-235 provide the courts with the ability to subpoena a reporter for non-confidential material and sources. This gives judges the opportunity to evaluate the need for each subpoena with a clearly defined test complete with specific guideposts to determine the proper scope of protection. Most importantly, the rule protects the people of Wisconsin. By protecting the news media's ability to report the news, the legislature can ensure that important issues continue to enter the public discourse and preserve the proper functioning of our democracy.

Senator Lena C. Taylor, Chair  
Senate Committee on Judiciary, Corrections, Insurance,  
Campaign Finance Reform and Housing  
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It may be helpful to the committee to explain that there is a difference between what is referred to as an "anonymous source" and what is recognized by publishers and editors as a "confidential source" deserving of a pledge of confidentiality.

In the first respect of an anonymous source, keep in mind that not all news stories begin at a news conference. Perhaps as often, the impetus for a news story comes from a person who provides a "tip" to a reporter with the request to "keep my name out of it." With no disrespect intended, I can tell you that many of those tips emanate from the Wisconsin State Capitol Building and other state and local governmental offices, as well as from sources in the private and not-for-profit sectors. With rare exception, a reporter and his or her editor will work to verify and corroborate that "tip" and will publish the information only after it is verified.

Contrast that situation with a "confidential source" – that is, a whistle blower in the public, private or not-for-profit sector who knows of waste, fraud, abuse or illegal activities that adversely affect the public interest. While new federal Sarbanes-Oxley provisions protect whistle blowers against retaliation within public agencies and publicly held companies, the effect tends to be specific to those specific organizations – and "SOX" provisions do not apply to privately held companies. A wider measure of protection is needed for those individuals who – usually at great personal risk – are willing to expose wrongdoing through a reporter and recognized news-gathering entity.

The granting of a pledge to maintain confidentiality is not taken lightly by publishers and editors. It is not done whimsically or capriciously because publishers and editors understand the risks involved for their newspapers. Many of our WNA member newspapers have written policies in place that reflect journalistic standards observed across the country: a reporter cannot make that pledge of absolute confidentiality on his or her own; editors must be involved in the decision – and usually, so are publishers and legal counsel. The pledge of confidentiality is provided only when there are no other means or sources to obtain such information. And in some cases, the pledge of confidentiality to a particular source becomes moot when other confirming or corroborating means are found to report the story.

The bottom line is that there are many times in today's increasingly complex society when only the direct knowledge or involvement of a particular individual can bring an illegal or fraudulent situation to public attention. Across the globe and particularly in this country, journalists traditionally have been the conduit to link the information source with public awareness. Publishers and editors clearly understand that credibility is the

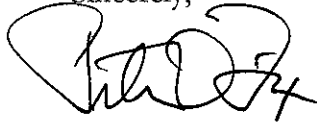
Senator Lena C. Taylor, Chair  
Senate Committee on Judiciary, Corrections, Insurance,  
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bedrock of public trust and the future of their newspapers. Journalists at all levels understand the privilege – and the responsibility – inherent in those rare cases when a pledge of confidentiality is provided to a confidential source.

This legislation is advocated by the Wisconsin Broadcasters Association and good-government groups as well as WNA. There is no opposition of which I am aware, and that is in the context of this proposal being widely reported over the course of several months in WNA member newspapers and by radio and television stations.

Wisconsin will benefit when citizen whistle blowers are confident they have protection from retaliation. Whistle blowers perform a public service when they take risks to expose corruption, malfeasance and violations of the public trust.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter D. Fox", with a large, stylized flourish at the end.

Peter D. Fox  
Executive Director  
Wisconsin Newspaper Association

cc: WNA Board of Directors

September 22, 2009

**VIA FACSIMILE - 608-282-3647**

State Representative Mark Gundrum  
State Capitol, Room 119 West  
Madison, WI 53702

RE: **AB 333**

Dear Rep. Gundrum:

This letter summarizes and expands on my July 14, 2009 testimony for the Wisconsin Newspaper Association before the Assembly Judiciary and Ethics Committee on the effect of the proposed Whistle-Blower Protection Act on the law of defamation. The short answer is: not at all.

Although some states exempt defamation cases from their statutes protecting anonymous sources, the courts have fashioned a variety of methods to protect the interests of defamation plaintiffs in those states that do not. The New Hampshire Supreme Court, for example, applies a presumption that the defendant had no source if the journalist refuses to identify his or her source, while Massachusetts awards a default judgment for the plaintiff in the same circumstance. Other states, like Idaho, eschew a fixed rule and vary the remedy depending on the importance of the source's identity to the plaintiff's case. The most common sanction, however, is to prohibit defendants who refuse to identify anonymous sources in defamation cases from introducing any evidence about them.

These rulings are summarized in a leading treatise on defamation law written by Judge Robert D. Sack, of the U.S. Court of Appeals, Second Circuit. *See Sack on Defamation*, Practising Law Institute, 3rd Ed. (2009), § 14.3.6. Judge Sack concludes that these court-imposed sanctions "put a defendant who protects confidential sources at an extreme disadvantage in defending himself or herself. The result can be a large adverse verdict as the cost of source protection." *Id.* at pp. 14-31.

Based on this case law, I testified to the Assembly Judiciary and Ethics Committee that the passage of AB 333 as proposed would not have any effect on the law of defamation in this state. Protecting anonymous sources would neither encourage irresponsible reporting nor provide journalists any greater protection than they currently enjoy from defamation liability. The states that protect whistleblowers from compelled identification without expressly exempting defamation cases have experienced no problems as a result, because the cost of

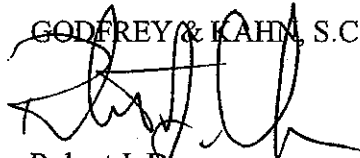
Rep. Mark Gundrum  
September 22, 2009  
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involving that protection is so great. I believe there is no need to amend the bill to exempt defamation cases because it does not alter the law of defamation as written.

Please let me know if you have any questions about the Wisconsin Newspaper Association's position in this matter.

Sincerely,

GODFREY & KAHN, S.C.



Robert J. Dreps

RJD:jlh

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